United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1323

B
P.P.

To be argued by
THOMAS H. SEAR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1323

UNITED STATES OF AMERICA,
Appellee,

—v.—

WYADELL EDMONDS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS H. SEAR,
JOHN C. SABETTA,
Assistant United States Attorneys, Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1323

UNITED STATES OF AMERICA,

Appellee,

—v.—

WYADELL EDMONDS,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Wyadell Edmonds appeals from a judgment of conviction entered on August 18, 1975, after a three day trial before the Honorable Richard Owen and a jury.

Indictment 74 Cr. 474, filed on May 10, 1974 charged that on or about May 1, 1974 defendant Wyadell Edmonds unlawfully, intentionally and knowingly possessed with intent to distribute approximately eleven grams of heroin in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

On May 22, 1974 Edmonds moved to suppress the heroin that had been seized from him at the time of his arrest and for disclosure of the identity of the informant involved in the case. On July 10, 1974 and September 10, 1974 an evidentiary hearing was held on those motions which thereafter were denied.

The initial trial of Edmonds on Indictment 74 Cr. 474 commenced on December 5, 1974 and continued until December 9, 1974 when a mistrial was declared because the jury was unable to agree on a verdict.*

On May 22 and 23, 1975 an evidentiary hearing was held on Edmonds' motions to suppress a tape recording of a conversation to which Edmonds was party that had been made subsequent to the first trial, for disclosure of the identity of the informant, for suppression of the heroin seized from Edmonds and for production of Sarah Roberts, whom defense counsel claimed was the informant, for interview by defense counsel. The trial court ordered the government to provide defense counsel with the last known address of Sara Roberts and denied the remainder of the motions.

The second trial of Edmonds on the indictment commenced on May 27, 1975 and continued until May 30, 1975 when the jury found Edmonds guilty as charged.**

On August 18, 1975 Edmonds was sentenced to 12 years' imprisonment to be followed by three years' special parole.

---

* Roland Thau, Esq. of the Legal Aid Society represented Edmonds at the hearings prior to the first trial. Edmonds represented himself at the commencement of the first trial, with Mr. Thau acting as a legal advisor. During the cross-examination of the first government witness Edmonds requested that Mr. Thau represent him during the remainder of the trial which Mr. Thau in fact did. (Transcript of Trial, December 5, 1974, 57-61).

** The retrial of Edmonds was originally adjourned on March 3, 1975 so that Edmonds could obtain private counsel. It later was set for April 21, 1975 but during the prior week Edmonds was arrested in Norfolk, Virginia and incarcerated on a bail jumping charge which necessitated a further adjournment.

Lawrence Kessler, Esq., assigned on May 12, 1975, represented Edmonds at the hearings prior to the second trial and at the second trial itself. On Edmonds' application for new, appointed counsel, Kirkland Taylor, Esq., was appointed by the trial court on June 20, 1975 to represent Edmonds for this appeal.

Statement of Facts

Prior to May, 1974 Edmonds was in the narcotics business with Jerome Christian. They dealt in both cocaine and heroin in New York City and together had made several trips from New York City to Norfolk, Virginia in connection with their business. (Christian 217).*

Sometime shortly before May 1, 1974 Edmonds decided to try to get some heroin from Willie James, Jr., who was known as "Junior", and take it down to Virginia to sell (Christian 135, 144). On two occasions in late April 1974 Edmonds told Christian about his plans. He said he was to pay Junior $1,200 for a half ounce but that he was having a problem getting the heroin from Junior. He also said his girl friend "Chris" would probably carry the heroin and that he and Chris would likely fly to Norfolk. Christian told Edmonds that it would be better to take a bus than a plane since traveling on a bus involved less risk. (Christian 135-137).

On April 30, 1974 Detective Horace Balmer of the New York Drug Enforcement Task Force received information from a confidential informant that Edmonds was going to Norfolk, Virginia for a court appearance

---

* The Statement of Facts is a chronological summary of the facts established both at the pre-trial evidentiary hearings and at the second trial. Citations refer to the pages of the trial transcript of the second trial, except where specific reference is made to the transcript of another proceeding, and indicate the witness whose testimony is there transcribed.

The Government's witnesses were Jerome Christian, who was arrested on a narcotics charge and who began cooperating with the federal government on May 16, 1974, Horace Balmer and William Frawley, New York Police Officers assigned to the New York Drug Enforcement Task Force and two agents of the Drug Enforcement Administration, James Steinberg and Francis Dunham.

there and that Edmonds would be carrying approximately two ounces of heroin that would take a "ten cut," which the informant had seen in Edmonds' possession. (July 10, 1974 Hearing, Balmer 16, 21). Later that same day the informant stated to Balmer that Edmonds would travel to Norfolk by bus and that he might have a female companion carrying the heroin for him. (July 10, 1974 Hearing, Balmer 17).*

As of that date Detective Balmer had known that confidential informant for about one year and the latter had previously provided information concerning the narcotics activities of Edmonds and other individuals to federal agents. (July 10, 1974 Hearing, Balmer 31).

In late January or early February, 1974 the informant had told federal agents that Edmonds was going to take heroin to Norfolk, Virginia at a certain time. (July 10, 1974 Hearing, Balmer 10). That information was sent to the Norfolk, Virginia Drug Enforcement Administration office which relayed it to the Norfolk Police Department. Detective Balmer was later informed that as a result of that information Edmonds was arrested in Norfolk, Virginia for possession of narcotics. (July 10, 1974 Hearing, Balmer 10-14). Also, prior to April 30, 1974, five undercover purchases of narcotics had been made by federal agents from persons whom the informant had described as narcotics sellers and narcotics had been seized and arrests had been made in two additional cases based on information the informant had supplied (July 10, 1974 Hearing, Balmer 15). Furthermore, the physical

---

* The identity of that informant has not been disclosed to Edmonds or his counsel. The trial court was informed, in an *in camera ex parte* affidavit by Assistant United States Attorney Paul Vizcarrondo, of the identity of the informant and the reasons why the government declined to disclose that individual's identity.

description of Edmonds that the informant had provided matched a photograph of Edmonds that Balmer had received in February, 1974 from the Norfolk District Attorney's office. (July 10, 1974 Hearing, Balmer 18).

When the informant told Balmer that Edmonds was going to Norfolk, Virginia for a court appearance Balmer already had been informed by the Norfolk District Attorney's Office that Edmonds was to appear there in court on May 1, 1974. (July 10, 1974 Hearing, Balmer 17).

As a result of all the information that had been received, at approximately 12:15 a.m. on May 1, 1974, Detective Balmer, Drug Enforcement Agents James Steinberg and Francis Dunham and other agents of the New York Drug Enforcement Task Force set up surveillance in the area of the Trailways Bus ticket counter in the New York Port Authority on Eighth Avenue, New York City. (Balmer, 29-30; Steinberg, 240; Dunham, 271-272). At approximately 12:45 a.m., Edmonds, carrying a gray suitcase, entered the Port Authority along with a woman later identified as Christine Summers. They walked up to the Trailways ticket counter. Edmonds asked the agent there for two tickets to Norfolk and at that moment both Edmonds and the female were placed under arrest by Balmer. Balmer then took the suitcase from Edmonds. (Balmer, 30-31; Steinberg, 241; Dunham, 273).

Edmonds and the female were then escorted by the agents out of the terminal. (Balmer [illegible]32). On the way out Edmonds spontaneously told Steinberg, who was holding Edmonds by the arm, that they should let the girl go because she had nothing to do with it. (Steinberg, 245). When they arrived outside, Balmer informed Edmonds and the female of their constitutional rights (Balmer, 33; Steinberg, 241; Dunham, 273).

Edmonds was taken to the Task Force headquarters and the suitcase (GX 4)* was opened and searched by Steinberg and Balmer (Balmer, 35; Steinberg, 242). Balmer discovered a black and white plastic bag (GX 5) in the suitcase. (Balmer, 36; Steinberg, 242). In the plastic bag there were two manila envelopes (GX 1-B and 1-C), one paper bag (GX 2-B) and an aluminum foil packet (GX 3-B). (Balmer, 39-41; Steinberg, 242). In addition to the black and white plastic bag there were various cosmetic items, women's and men's clothes, and a wig in the suitcase (Balmer, 60-61; Steinberg, 242-243). However, when the contents of the black and white plastic bag were discovered, Edmonds stated to Balmer and Steinberg that the girl had nothing to do with what they had found in the suitcase. (Balmer, 41; Steinberg, 246).

After the arrest, the female accompanying Edmonds, Christine Summers, was taken to Manhattan South Precinct to be searched and was released shortly thereafter. (Dunham, 276).

The various packages contained in the black and white plastic bag were later delivered to a Drug Enforcement Administration Chemist and an analysis made of their contents. That analysis revealed that: 1. the two manila envelopes (GX 1-B, 1-C) contained 8.4 grams (net weight) of 99.6 percent pure heroin hydrochloride; 2. the paper bag (GX 2-B) contained 18.2 grams of quinine hydrochloride, starch and lactose; and 3. the aluminum foil packet (GX 3-B) contained 19.8 grams of mannite.**

---

* Reference to a Government Exhibit is abbreviated herein as "GX."

** In the narcotics business when heroin is sold it is usually diluted or "cut" by the seller in order to make a profit. The resulting dosage of heroin that is actually sold to an addict is on the average only two or three percent heroin. (Dunham 289-290). Quinine, lactose and mannite are agents which are commonly used to dilute or "cut" heroin. (Dunham 289).

On May 1, 1974 Edmonds was also interviewed by Assistant United States Attorney Alan Kaufman. At that time, Balmer informed Kaufman of the circumstances surrounding Edmonds' possession of the heroin at the Port Authority, and after being warned again of his constitutional rights, Edmonds stated that what the agent said was correct. (Balmer 44, 49, 301). He also admitted that he did not himself use narcotics. (Balmer 49).

Subsequently, on or about May 4, 1974 Edmonds called up his friend Jerome Christian and related how he had been arrested at the bus station and that the agents had found his heroin in the suitcase of his girl friend "Chris." (Christian 139).

On May 16, 1974 Christian was arrested for a narcotics offense and agreed to cooperate with agents of the Task Force.

On January 23, 1975, while working in an undercover capacity and with a "Kel" wireless transmitter and a "Nagra" tape recorder concealed on his body, Christian went to an apartment at 101 West 136th Street in Manhattan and met and talked with Jack Kennedy, Willie James, Jr. ("Junior") and Edmonds. (Christian 141).

That conversation was recorded in part on the "Nagra" recorder and in whole by Detective William Frawley of the Task Force who was monitoring and recording the signals being sent out by the "Kel" transmitter. (Frawley 118-121).

At one point during that conversation there was a brief discussion of the circumstances surrounding Edmonds' purchase of heroin from Junior in April, 1974, his attempt to take it to Virginia and his arrest on May 1, 1974.

Essentially, Junior stated that the heroin had been 100 per cent pure and Edmonds replied that he had not believed that the heroin was that pure when he had bought it from Junior, and that he learned of the purity of the heroin only when he was brought before the judge after his arrest for the purpose of fixing bail. Both Christian and Junior stated that Edmonds had been foolish to try to take the heroin to Virginia instead of selling it in New York. Edmonds replied, in substance, that he was simply trying to get to Virginia to make money and that Christian knew what he could have done with the heroin, and what money he could have made with it in Virginia.* (GX 8, 9; Christian 142-143).

Prior to the commencement of the second trial Christine Summers, who was pregnant with Edmonds' child, had an abortion, became seriously ill and died. On May 27, 1975, for the first time, Edmonds advised the court and the government of her death and the fact she was being buried that very day. At that time the trial court stated, and Edmonds agreed, that as a practical matter

---

* Government's Exhibit 8 is the tape recording made of the conversation on January 23, 1975 amongst Junior, Kennedy, Edmonds and Christian. Government's Exhibit 9 is the transcript of the portion of that recording which was played to the jury and which relates to the facts of this case.

Prior to trial a hearing was held on Edmonds' motion to suppress that recording on the grounds that it was made after the indictment of Edmonds in violation of the principles set forth in *United States* v. *Messiah*, 377 U.S. 201 (1964).

However, the trial court denied that motion. In so doing it found that Christian was present at the apartment on January 23, 1975 and equipped with recording devices solely because he was working on a case involving Mr. Kennedy, that he did not know Edmonds would be present and that he did not in any way elicit the statements Edmonds made about the heroin he had tried to take to Virginia (May 22 and 23, 1974 Hearing, 103). Edmonds has not appealed from the trial court's order denying that motion to suppress.

there was no way of getting Edmunds to the burial. (May 27, 1975 Hearing, 107-118). That afternoon a jury was selected and trial commenced the next day, May 28, 1975.

During the trial counsel for defendant located, subpoened and interviewed Sarah Roberts at length. In substance, she stated that prior to May 1, 1974 she had previously been in the narcotics business with Edmonds, and that she had been arrested for narcotics and sentenced to probation prior to April 30, 1974.* She admitted being in Edmonds' house early on April 20, 1974 but denied that she was the informant. She stated that she had not assisted in packing the suitcase, had not seen it packed and had not supplied Edmonds with the heroin which was found in the suitcase upon his arrest. (June 18, 1975 Kessler Affidavit; November 18, 1975 Kessler letter to the Honorable Richard Owen; Kessler 379). Counsel for Edmonds, aware that testimony harmful to Edmonds would be elicited by the government in its cross-examination if the defense were to call Sara Roberts, persuaded Edmonds that she should not be called as their witness (Kessler 379-380; Edmonds 374).

Edmonds himself did not testify. In fact, the only witness called by Edmonds was Detective Balmer, who as a defense witness testified that as of May 1974 8.4 grams of 99.4% pure heroin, when diluted into single dosages, would have a street value of approximately $50,000. (Balmer 312-314).

During the trial, in the cross-examination of Balmer and Steinberg, counsel for Edmonds made it clear that he was going to argue in summation that Christine Summers, who had been arrested with Edmonds, had planted

---

* Detective Balmer stated that he did not believe the informant had been sentenced as of May 1, 1974 (Balmer 111).

the heroin on Edmonds without his knowledge, had informed on him and that the agents had feigned her arrest in order to protect her identity. (Balmer 70-72, 91-92; Steinberg 258) (see August 18, 1975 Sentencing, 17-18). However, when Edmonds' counsel began to make that argument in summation Edmonds interrupted and, in front of the jury, stated that he was not going to allow that argument to be made. (367). Edmonds thereupon voluntarily absented himself from the courtroom after being told that such action would prejudice his case and summations continued in his absence. (367-382, 395).

ARGUMENT

POINT I

The trial court correctly ruled that the identity of the informant need not be disclosed.

Edmonds claims that the trial court erred and substantially prejudiced his defense in not ordering the government to disclose the identity of the informant who had provided the information concerning his attempt to take the heroin he had purchased from Junior to Norfolk, Virginia to sell. Specifically, Edmonds claims that his ex-wife Sarah Roberts (and/or Ronnie Evans, her present husband) was the informant and that she supplied the heroin to Edmonds. Edmonds then argues that if she was the informant and her identity as such was revealed those alleged actions by her would provide a defense for him against the charge of unlawful possession of the heroin.

On appeal Edmonds does not state exactly what the factual and legal bases for such a defense would be. However, it appears that Edmonds is claiming that he

would have been able to rely on either one or both of two related legal defenses if the informant was Sarah Roberts and her identity had been revealed.

First of all Edmonds seems to suggest that he could have argued that Sarah Roberts set him up by placing the heroin in the suitcase, without his knowledge, and then informed on him. Of course, if Edmonds could have demonstrated that Sarah Roberts or anyone else had placed the heroin in the suitcase without his knowledge he would have established a defense irrespective of who the informant was. Accordingly, to establish that defense in no way required knowledge of the informant's identity. Secondly, Edmonds seems to suggest that if Ms. Roberts was revealed as the informant he could have argued that since she was a government agent and supplied the heroin to him he had been entrapped as a matter of law irrespective of his predisposition to deal in heroin.

We note preliminarily that even assuming, *arguendo*, that Ms. Roberts had supplied the heroin to Edmonds and that she was the government informant, it is entirely unclear in this Circuit whether such facts would suffice to establish a defense of entrapment as a matter of law when the defendant is shown to have been predisposed to commit the offense charged. *See United States* v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973); *United States* v. *Kohn*, 365 F. Supp. 1031 (E.D.N.Y. 1973), *aff'd*, 495 F.2d 763 (2d Cir. 1974). *Compare United States* v. *Mosley*, 496 F.2d 1012 (5th Cir. 1974), *with United States* v. *McGrath*, 494 F.2d 562 (7th Cir. 1974).

More importantly, neither at trial or on appeal has the assertion of either possible defense been supported by anything more than mere speculation. At no time did Edmonds or his counsel suggest one iota of evidence that was available that would or could have supported the notion that the heroin was planted on Edmonds by any-

one without his knowledge or that Edmonds received the heroin from Sarah Roberts, Ronnie Evans, Christine Summers or any other individual who might have been a government informant.*

As already noted, the government represented in an in camera *ex parte* affidavit to the trial court that it had no information which in any way suggested that the informant had given the heroin to Edmonds or placed it in the suitcase.

Furthermore, counsel for Edmonds had full opportunity to interview Sarah Roberts, the person Edmonds claims was the informant, and nothing she said indicated or even implied that she had supplied the heroin or packed the suitcase.

In contrast to the complete absence of any suggested factual basis for Edmonds' purported defense that supposedly required disclosure of the informant's identity the evidence at trial that Edmonds had bought the heroin from Junior was both uncontradicted and overwhelming. Besides the testimony of Christian the jury heard Edmonds himself on the tape recording of the January 1975 conversation discuss his purchase of the heroin from Junior and his attempt to take it to Virginia to sell.

In *United States* v. *Soles*, 482 F.2d 105 (2d Cir.), *cert. denied*, 414 U.S. 1027 (1973) this Court recently discussed at some length the factors that a trial court should consider in determining whether, in the exercise

---

* Edmonds did not testify on his own behalf nor did his counsel or Edmonds ever suggest that he might or make a proffer of what he might say if he did. Given Edmonds' extensive prior criminal record (see GX 3503), it appears that it was never a realistic possibility.

of its discretion, it should order the government to disclose the identity of a confidential informant. It stated:

> "The guiding principles are stated in *Roviaro* v. *United States*, 353 U.S. 53, 61-62, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957). Soles relies on the words we have italicized in the following sentence from the opinion:
>
> > Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.
>
> Both reason and context demonstrate, however, that these words are not to be read with extreme literalness. Determining whether the testimony of an informer is likely to be 'relevant and helpful' is a task best left to the trial court's informed discretion. On the next page of the *Roviaro* opinion, the Court made it clear that the principle of disclosure is far from absolute, 353 U.S. at 62, 77 S. Ct. at 628:
>
> > We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." 482 F.2d at 108-09.

The Court went on to say that:

> "Under these circumstances Judge Tyler was abundantly justified in believing that the request for disclosure of the identity and whereabouts of the informer was a ploy designed to embarrass the Government and that it had no real possibility of affording a defense that could create a reasonable doubt in the mind of a reasonable juror." 482 F.2d 109-10.

The fact that a defendant may assert, or desire to assert, the defense of entrapment in no way supports a request that the identity of the informant be disclosed. First of all, a defendant cannot obtain such disclosure simply by asserting he might wish to raise such a defense. He must come forward with independent evidence to support the defense and evidence to support the claim that the informer's testimony is essential to that defense. Mere assertions or speculation by counsel unsupported by any facts in the record are not sufficient. *United States* v. *D'Amato*, 493 F.2d 359 (2d Cir. 1974); *United States* v. *Hodges*, 493 F.2d 11 (5th Cir. 1974); *cf. United States* v. *Morell*, Dkt. No. 74-1827 (2d Cir. Aug. 29, 1975) Slip Op. 5873, 5886. Also, when the claim of entrapment by the informant is clearly implausible, as it was in this case, disclosure is simply not warranted. *United States* v. *Ortega*, 471 F.2d 1350, 1357-1359 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973).

In this instance it is absolutely clear from all the facts that Edmonds' request that the identity of the informant be disclosed was not based on any good faith attempt to develop at trial a legitimate defense but rather was based on other considerations. Accordingly, under the principles enunciated by this Court the trial court correctly exercised its discretion when it declined to order such disclosure.

POINT II

Probable cause for the arrest of Edmonds clearly existed.

Probable cause has been defined to exist when the facts and circumstances within the knowledge of the arresting officers and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that an offense had been or is being committed. *Beck* v. *Ohio*, 379 U.S. 89 (1964); *Draper* v. *United States*, 358 U.S. 307, 313 (1959).

In the type of case like that presented here, where much of the information forming the basis of the police officers' probable cause is supplied by a confidential informant, the test for determining probable cause is two-pronged: (1) whether the informant was reliable and credible, and (2) whether the information provided by the informant contained a sufficient statement of underlying circumstances from which the police officer could form the reasonable belief that the accused was engaged in criminal activity. *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969).

1. Reliability of the informant.

The confidential informant in the present case was personally known to Detective Balmer as highly reliable and credible. Prior to April 30, 1974 the informant had provided information which directly led to five purchases of narcotics by undercover agents and to three seizures of quantities of heroin and cocaine. Among the information supplied by this informant prior to the instant case was a tip that was responsible for the February 1974 arrest of the defendant Edmonds in Norfolk, Virginia,

for possession of narcotics. Detective Balmer was aware of this; he had relayed the information to the Drug Enforcement Administration in Norfolk, who had arrested Edmonds. It was for a court appearance in connection with that arrest that Edmonds was travelling to Norfolk in the early morning hours of May 1, 1974.

Such proven past reliability is clearly more than sufficient to satisfy the first prong of *Aguilar-Spinelli*. *United States* v. *Acarino*, 408 F.2d 512, 514 (2d Cir.), *cert. denied*, 393 U.S. 961 (1969); *United States ex rel. Cunningham* v. *Follette*, 397 F.2d 143 (2d Cir. 1968), *cert. denied*, 393 U.S. 1058 (1969); *United States* v. *Repetti*, 364 F.2d 54 (2d Cir. 1966).

2. The information provided by the informant was justifiably relied upon as credible and as gained in a reliable manner.

The second prong of the *Aguilar-Spinelli* test may be satisfied by either describing the manner in which the informant's information was gathered or by showing that the information described the accused's criminal activity in sufficient detail to warrant a police officer's reasonable inference that the informant had gained the information in a reliable way. *Spinelli* v. *United States*, *supra*; *McCray* v. *Illinois*, 386 U.S. 300 (1967); *Draper* v. *United States*, *supra*. The second method of satisfying the second prong of the test applies in this instance.

The information provided by the informant herein was certainly sufficiently detailed so that Detective Balmer could justifiably rely on it as credible and reliable. The informant reported that Edmonds had to be in Norfolk, Virginia, on May 1, 1974, and would travel to Norfolk on the evening of April 30th. The informant further

stated that Edmonds might be travelling with a female companion. The informant, when providing the tip in connection with the February 1974 arrest, had provided a physical description of Edmonds. The informant reported that Edmonds, or his companion, would be carrying about two ounces of heroin, which would be able to take a "ten cut" and that the informant had seen the heroin in Edmonds' possession.

An informant's report which, standing alone, may not establish probable cause may be corroborated by independent investigation which verifies the informant's report and thereby satisfies the second prong of the *Aguilar-Spinelli* test. *United States* v. *Canieso*, 470 F.2d 1224 (2d Cir. 1972); *United States* v. *Acarino*, 408 F.2d at 514-15.

Independent police investigation, and prior police knowledge, had verified that Edmonds previously had been arrested on narcotics charges; had verified that Edmonds was due in court in Norfolk, Virginia on May 1, 1974, and had verified Edmonds' physical description by obtaining his photograph. Furthermore, when Edmonds and the woman were observed entering the Port Authority Terminal shortly before 1:00 a.m. and Edmonds was heard to ask for two tickets to Norfolk, Virginia, the informant's statement that Edmonds was going to travel to Norfolk, possibly with a female, was verified.

The detailed information given by the informant, coupled with the corroboration supplied by independent police investigation, supplied the informant's report with undeniable reliability sufficient to satisfy *Aguilar-Spinelli*. *Draper* v. *United States*, *supra*; *United States* v. *Foster*, 478 F.2d 1001 (7th Cir. 1973); *United States* v. *Comissiong*, 429 F.2d 834 (2d Cir. 1970); *United States* v. *Acarino*, *supra*; *Smith* v. *United States*, 358 F.2d 833

(D.C. Cir. 1966), *cert. denied*, 386 U.S. 1008 (1967); *United States* v. *Repetti*, *supra*.

In *United States* v. *Acarino*, *supra*, the second prong of the *Aguilar-Spinelli* test was discussed. The deficiency in both *Aguilar* and *Spinelli* (both cases involving affidavits in connection with applications for warrants) was that the information received from the informant and included in the affidavit gave only generalized descriptions of criminal activity.* However, in *Acarino*, as in the instant case, the information gave the agent in detailed fashion "a precise prediction of a crime about to occur", and the informant did so from personal knowledge rather than suspicion or belief. 408 F.2d at 514.

Draper v. *United States* is directly in point. In *Draper*, the arresting officer received information from an allegedly reliable informant that Draper was peddling narcotics in Denver, that Draper had gone to Chicago on September 6th, and that Draper was going to return to Denver by train on either September 8th or 9th carrying

---

* In *Aguilar*, 378 U.S. at 109, the officers' affidavit stated that they

> "have received reliable information from a credible person and do believe that heroin, marijuana, barbituates and other narcotics and narcotic paraphernalia are being kept at the above-described premises for the purpose of sale and use contrary to the provisions of law."

In *Spinelli*, 393 U.S. at 414, the affidavit stated that the agents had

> "been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wager information by means of the telephones which have been assigned the numbers WY 4-0029 and WY 4-0136."

The grounds for establishing probable cause for any arrest without a warrant are basically similar to those required for the issuance of a search warrant. *Spinelli* v. *United States*, 393 U.S. at 417 n.5.

three ounces of heroin. The informant gave the officer a description of Draper, said that Draper would be carrying a tan bag, and would be walking very fast. The Court held that these facts, plus the corroboration by the police of the details supplied by the informant gave reliability to the contents of the informant's report, and therefore were sufficient to warrant the arresting officer's reasonable belief that an offense was being committed and thus to justify the arrest based on probable cause.

In *McCray* v. *Illinois*, 386 U.S. 300 (1967), the police officer had been told by an informant that McCray was selling narcotics and had narcotics in his possession, and that he could be found in the vicinity of 47th and Calumet. The police officers drove to that location with the informant, who pointed out McCray. Other than observing McCray walk hurriedly away, the officers observed McCray do nothing suspicious. The Court upheld McCray's arrest, stating that

> "the facts and circumstances within the [police officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was commtting an offense." 386 U.S. at 304.

In *United States* v. *Cappabianca*, 398 F.2d 356 (2d Cir.), *cert. denied*, 393 U.S. 935 (1968), a confidential informant told a police officer that three individuals had committed a particular bank robbery, and that they were using a Holiday Inn as a base of operation. The informant stated that he knew this from personal contact. The police officer knew the informant from prior cases as a reliable informant. On the basis of this information, the police arrested the defendants in the Holiday Inn, and seized incriminating evidence.

The Court held that there was probable cause for the arrests:

> "Since there was ample ground for believing the informant to be reliable and since the informant stated that his information was based on personal contacts, there was probable cause to justify the arrests. [Citation to *Aguilar*]. Moreover locating [the defendant] in a room at the Holiday Inn which had been rented earlier in the day by [a co-defendant] provided sufficient corroboration of the informant's story." 398 F.2d at 358-59.

As in *Draper*, *McCray* and *Cappabianca*, the officers in the case at bar were supplied by an informant of proven reliability with information sufficiently detailed, and corroborated to the extent possible by the officers, to warrant the reasonable belief that the informant's report was reliable and credible. *See United States* v. *Romero*, 343 F. Supp. 988 (S.D.N.Y. 1972) (Gurfein, J.).

Specific factors which this Court has relied upon as determinative of the issue of probable cause further emphasize the strong showing in the instant case; the specificity of the information given by the informant; a precise prediction of the crime that is about to occur as opposed to a more generalized description of suspected past and present criminal activity; the informant's personal first-hand knowledge rather than mere suspicions and casual rumors; and the reliability of the informant's information from past experience. *United States* v. *Acarino*, *supra*. When measured against the above factors, the particular facts and circumstances in the instant case present an overwhelming case of probable cause to arrest defendant Edmonds for possession of narcotics.

Edmonds' claim that the government failed to establish probable cause for arrest because it declined to reveal the identity of the informant, either directly or indirectly

by disclosing the cases the informant had provided information on, is totally without merit.

When the request for disclosure of an informant's identity is made in connection with a hearing to determine a police officer's probable cause to arrest, disclosure is required only when the information supplied by the informant constitutes the "essence or core or main bulk" of the probable cause. *United States* v. *Tucker*, 380 F.2d 206, 212 (2d Cir. 1967).

In *United States* v. *Comissiong*, 429 F.2d 834 (2d Cir. 1970), this Court made a thorough analysis of the law dealing with the confidentiality of informants and held that disclosure of the informant's identity is required only when the existence of probable cause depends *solely* on the reliability of the informant. *See McCray* v. *Illinois*, 386 U.S. 300 (1967). If independent police investigation and corroboration contributed to probable cause, then the informant's information does not constitute the "essence or core or main bulk" of probable cause, and the disclosure of the informant's identity is not required. *Comissiong* held that disclosure was not required when:

> "[t]he independent evidence, even though not adequate of itself to establish probable cause, constitutes a sufficient voucher against fabrication, although obviously not a complete one." 429 F.2d at 839.

This Court has consistently followed that test for disclosure of an informant's identity in situations where probable cause for arrest is at issue. *United States* v. *Carneglia*, 468 F.2d 1084 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973); *United States* v. *Johnson*, 467 F.2d 630, 640 (2d Cir. 1972); *United States* v. *Oliva*, 432 F.2d 130 (2d Cir. 1970); *United States* v. *Gazard Colon*, 419

F.2d 120 (2d Cir. 1969); *United States* v. *Malo*, 417 F.2d 1242 (2d Cir. 1969); *United States* v. *Cappabianca*, 398 F.2d 356 (2d Cir.), *cert. denied*, 393 U.S. 935 (1968); *United States* v. *Shyvers*, 385 F.2d 837 (2d Cir. 1967), *cert. denied*, 390 U.S. 998 (1968).

The thrust of these cases is to ensure the existence and reliability of the confidential informant, and to protect against the possibility that a police officer may conjure up the confidential informant and act in accordance with his own suspicion rather than on fact. It is this danger—the non-existence of the informant—that the test regarding disclosure of confidential informants is designed to meet. When the informant's information has been at least partially corroborated disclosure is not required. *United States* v. *Johnson*, 467 F.2d 630, 639-640 (2d Cir. 1972).

For example, in *United States* v. *Carneglia*, 468 F.2d 1084 (2d Cir. 1972), the informant's tip was that certain trucks contained particular hijacked merchandise, and specified the trucks' location. The agents corroborated this tip by locating the trucks, and thereafter observing individuals, known to the agents to be hijackers, in possession of the trucks. The Court affirmed the order refusing disclosure of the informant's identity at a suppression hearing, stating that the on-the-scene corroboration of key elements of the informant's tip served as a safeguard against fabrication. 468 F.2d at 1088-89.

In *United States* v. *Gazard Colon*, 419 F.2d 120 (2d Cir. 1969), the informant, who had previously supplied reliable information, told the agents that he had observed the defendant in possession of heroin, and that he had heard that the defendant, the next day, would be carrying heroin again, probably under the front seat of his car. The informant took the agents to the location of the

car. The agents maintained surveillance of the car, and the defendant later appeared, unlocked the car and got in, and bent forward as if placing something under the seat. He was then arrested, and a search revealed heroin under the front seat. The Court again affirmed the trial court's refusal to order disclosure, stating that there was nothing which cast any suspicion on the accuracy of the informant's tip, and that the agents' own knowledge and observations corroborated much of the informant's information. 419 F.2d at 122.

In *United States* v. *Cappabianca*, 398 F.2d 356 (2d Cir.), *cert. denied*, 393 U.S. 935 (1968), the informant, who had previously supplied reliable information, told the police that three individuals had committed a recent bank robbery, and that they were using a particular motel as a base of operations. The Court once more affirmed the trial court's refusal to order disclosure, holding that independent corroboration existed by virtue of the police knowing the defendants and their criminal record, and because of their finding the defendants in the motel mentioned by the informant. 398 F.2d at 359.

As already discussed in the instant case there was evidence of independent police corroboration that was far more extensive than in the above mentioned cases which ensured against the danger of fabrication and non-existence of the informant and fully justified the trial court's ruling made in connection with the probable cause hearing that the informant's identity need not be disclosed.

POINT III

The search of Edmonds' suitcase was clearly lawful as a search incident to arrest.

It is a fundamental proposition of law that a reasonable search conducted without a warrant and incident to a lawful arrest does not offend the Fourth Amendment to the Constitution and that a search incident to an arrest may extend to things within the immediate control of the accused. *Chimel* v. *California*, 395 U.S. 752 (1969); *Beck* v. *Ohio*, 379 U.S. 89 (1964). In this case the suitcase, the search of which Edmonds challenges, was obviously within Edmonds' control at the time of arrest.

In the past this Court has applied a rule that a search that is purportedly lawful because it is incident to an arrest must be conducted substantially contemporaneous with the arrest. *United States ex rel. Muhammad* v. *Mancusi*, 432 F.2d 1046 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971).

In *United States* v. *Edwards*, 415 U.S. 800 (1974), the Supreme Court eliminated such a requirement and held a search was lawful as incident to arrest even though it was conducted many hours after the accused was arrested. However, even under the rule that the search must be substantially contemporaneous with the arrest, this Court and numerous other United States Circuit Courts of Appeals have made it clear that the search need not occur at the exact time and place of arrest. *United States ex rel. Muhammad* v. *Mancusi*, *supra*; *United States* v. *Frankenberry*, 387 F.2d 337 (2d Cir. 1967); *United States* v. *Miles*, 413 F.2d 34 (3d Cir. 1969); *Morris* v. *Boles*, 386 F.2d 395 (4th Cir. 1967), *cert. denied*, 390 U.S. 1043 (1968); *United States* v. *Moore*, 477 F.2d 538 (5th Cir. 1973); *Leffler* v. *United States*, 409

F.2d 44, 48 (8th Cir. 1969); *Cotton* v. *United States*, 371 F.2d 385 (9th Cir. 1967); *Malone* v. *Crouse*, 380 F.2d 741 (10th Cir. 1967), *cert. denied*, 390 U.S. 968 (1968).

In *United States ex rel. Muhammad* v. *Mancusi*, *supra*, this Court, in applying the substantially contemporaneous rule, held that a search of a briefcase of an accused, that would have been lawful at the spot of arrest, was just as lawful when done shortly after the arrest at FBI headquarters.

In this case it made eminent sense for the agents to wait to search the suitcase until they arrived at their headquarters.

Under those circumstances it is clear under both the standard set forth in the *Mancusi* case and the recent ruling of the Supreme Court in *United States* v. *Edwards*, *supra*, that the search of Edmonds' suitcase at Task Force Headquarters and seizure of the heroin contained in that suitcase were proper as incident to the arrest of Edmonds.

POINT IV

There was no reason to assign the retrial of Edmonds to a new trial judge.

In *United States* v. *Bryan*, 393 F.2d 90 (2d Cir. 1968), this Court held that in *certain circumstances* the retrial of a *lengthy* criminal case should be reassigned to a new trial judge. In *United States* v. *Newman*, 481 F.2d 222 (2d Cir. 1973). this Court emphasized that such a practice is not required in every case even when a motion to disquality is made. In this case both the first and second trials were short and there was no basis in the record even to suggest a bias by the trial judge against Edmonds. More importantly, neither Edmonds nor his counsel ever requested or

suggested that the case be reassigned. Accordingly, there is no ground at all to support Edmonds' claim, made for the first time on appeal, that he merits a new trial because he was tried and retried in front of the same trial judge.

POINT V

The trial of Edmonds was completely fair and in no respect amounted to a denial of due process.

Counsel for Edmond argues that Edmonds was denied due process because of several different factors, none of which he admits, taken alone would justify granting a new trial. Even the briefest consideration of each one of counsel's arguments establishes that they are totally without merit.

First of all, Edmonds did state that he was upset at the death of Christine Summers. However, prior to Edmonds outburst during the summation by his counsel there was not even a suggestion by Edmonds or his counsel that his mental condition necessitated a continuance. In that regard the prejudicial impact, if any, caused by Edmonds' comments during the summation in no way constitutes proper grounds for a new trial. Edmonds had been made aware prior to the summation that his counsel would make the argument concerning Christine Summers that was made. Ordering a new trial would simply mean that a defendant could in effect occasion a mistrial whenever he so wished.

Similarly, there is no factual basis in the record for the claim that Edmonds was not assigned counsel in sufficient time to prepare for trial. Mr. Kessler, a professor of law at Hofstra University and an experienced trial

attorney, was assigned over two weeks prior to trial and at no time suggested to the court that he did not have adequate opportunity to prepare.

Appellate counsel now suggests that the failure to call Sarah Roberts as a witness and the defense theory that Miss Summers was the informant and had "planted" the drugs on Edmonds without his knowledge "promoted" the guilt of Edmonds in the minds of the jury. In fact, the testimony of Mr. Christian and the tape of Edmonds' inculpatory conversation played at trial made it clear that no one had "planted" the heroin on Edmonds and that neither woman had supplied him with the heroin. Moreover, as defense counsel recognized, calling Ms. Roberts as a witness was fraught with dangers to Edmonds since, even if she had been the informant and were forced to admit that fact on the witness stand, she had unequivocally denied having anything to do with supplying the heroin that Edmonds had been arrested with. Also, if she had been the informant she would obviously testify to having seen the heroin in Edmonds' possession on April 30, 1974. Furthermore, her testimony about her prior narcotics dealings with Edmonds would have greatly damaged any chance of acquittal that he had.

On the other hand, since Miss Summers was dead, counsel for Edmonds was able to argue the defense theory that the drugs were "planted" on Edmonds by her without any fear of contradiction, since the government had refused to reveal who was or was not the informant.

In short, the trial in its entirety was eminently fair to Edmonds and it is clear he was found guilty by the jury not because of any error in strategy of defense counsel but rather simply because of the overwhelming evidence of his guilt.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS H. SEAR,
JOHN C. SABETTA,
Assistant United States Attorneys, Of Counsel.

★ U. S. Government Printing Office 1975— 614—350—596

Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Thomas W. Lean. being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 5th day of December, 1975 he served ~~a copy~~ of the within Brief by placing the same in a properly postpaid franked envelope addressed:

W. Kirkland Taylor, Esq.
35 West 125th St.
New York, N.Y. 10027

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing IN the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Thomas W. Lean.

Sworn to before me this
5th day of December, 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977